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December 15, 2006

Philip Hogen, Chairman
National Indian Gaming Commission
1441 L St., N.W., Suite 9100
Washington, D.C. 20005
Facsimile: (202) 632-7066

Re: Comments on *The Potential Economic Impact of Proposed Changes to Class II Gaming Regulations*, by Dr. Alan Meister of the Analysis Group, released by the National Indian Gaming Commission, November 6, 2006.

Dear Chairman Hogen:

We write on behalf of the Absentee Shawnee Tribe of Oklahoma to provide comments on the recently released study of the economic impacts of the proposed Class II definitions and classification standards proposed by the National Indian Gaming Commission ("NIGC"). Alan Meister, *The Potential Economic Impact of Proposed Changes to Class II Gaming Regulations* (Analysis Group 2005) ("Study").

As an initial matter, the Tribe commends the NIGC for commissioning this study. Dr. Meister has prepared an insightful analysis of the negative impacts tribes nationwide can expect if the NIGC adopts its proposed Class II rules. The Study demonstrates that the nationwide negative impacts of the proposed rules will be significant, and probably severe: the only scenario in the Study to use data from all tribes using Class II games calculates approximately $1.5 billion dollars in lost gaming revenue. Due to the potential for devastating economic losses across Indian country, the Tribe urges the NIGC to carefully consider the quantified and non-quantified negative economic consequences before adopting the proposed rules.

While the Study paints a bleak picture of the proposed rules' economic impact, it fails to quantify or discuss several negative impacts the Absentee Shawnee Tribe (and other Oklahoma tribes) can expect. It inexplicably excludes the tribes in Oklahoma and several other states from the central scenario (Scenario 2), based on the unsupported premise that such Tribes will not experience decreases in gaming revenue. The figures generated by Scenario 2 for lost gaming revenue, lost non-gaming revenue, lost tribal government revenue, and lost tribal member jobs, provide nothing more than a minimum baseline of the actual negative economic impact nationwide. Consideration of the impacts on excluded jurisdictions and the non-quantified impacts nationwide, would provide the NIGC with a more realistic picture of the probable negative economic effects of the proposed rules. Further, the gaming situation in Oklahoma—the largest Class II market—presents a unique set of circumstances, and the Tribe believes the proposed rules would devastate the Oklahoma Class II gaming market.

The comments which follow provide more detail on specific areas where the Study fails to quantify the proposed rules' negative economic impacts.

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Estimated Percentage Decrease in Gaming Revenue

The Study estimates the expected percentage decrease in gaming revenue by using MegaMania's performance to predict the performance of games compliant with the proposed rules. Study at 33–36. As a result of the methodology employed, the premise that MegaMania's performance equates to the expected performance of a game compliant with the proposed rules leads directly to the quantification of lost gaming revenue, lost non-gaming revenue, lost tribal government revenue, and even lost tribal member jobs. Each of these calculations relies on the difference between the performance of Class II games currently in play and MegaMania. Study at 36–47.

While BMM's simulation results seem to corroborate the Study's premise—that MegaMania's performance can be used to predict the performance of games compliant with the proposed rules—this corroboration should not be overstated. Each of the BMM performance simulations cited in the Study assumes an equivalent number of players for the games being compared. Study at 35. Obviously, if games compliant with the proposed rules draw fewer players than games currently in play, as many in the industry expect, the decrease in revenue caused by switching from current Class II games to games compliant with the proposed rules will be significantly greater than BMM's calculated percentage decrease.

Although the BMM simulation results provide some corroboration, the Study uses only MegaMania's actual performance to calculate the percentage decrease in gaming revenue per machine caused by the proposed rules. In Table 3, the Study suggests that the only difference between MegaMania and a game compliant with the proposed rules is that MegaMania player stations lacked a prominently displayed message declaring that it "is a game of bingo or game similar to bingo." Study at 34. In fact, MegaMania diverges from the proposed rules in several respects, each of which would cause compliant machines to perform worse than MegaMania. Had the Study taken these differences into account, the expected percentage decrease would have been much greater, and, therefore, the estimated lost gaming revenues would have been much greater. These differences include the following:

- The proposed rules would require that the game-winning prize be awarded in every game and be "no less than 20% of the amount wagered by the player on each card and at least one cent." Proposed 546.4(j). The Study fails to mention that MegaMania did not require that the game-winning prize be awarded in each game.

- The proposed rules would distinguish between interim and consolation prizes and would require a ball release pause when enough balls have been released for the first potential game-winning pattern. Consolation prizes could only be awarded "after a subsequent release of randomly drawn or electronically determined numbers or other designations has been made." Proposed 546.4(l). MegaMania did not meet these standards: it released balls in sets of three and did not pause if the first or second ball in the set were sufficient to achieve the game-winning pattern.

- The proposed rules would also prevent prizes, including bonus prizes won during the first release, from being claimed until at least two ball releases occur. Proposed 546.6(i). Again, MegaMania would not satisfy this standard.
- The study fails to acknowledge that the proposed rules implicitly prohibit ante-up rules. They require that at least two players agree to ante-up. If not, the last player "will be declared the winner of the game-winning prize, and the game will end, provided that player obtains and covers (daubs) the game-winning pattern." And "[i]f all players leave the game before a game-winning pattern is obtained and covered (daubed) by a player, the game *will be declared void and wagers returned to the players*." Proposed 546.6(k). (emphasis added). This rule would require that all players get a full refund even if they had paid and played multiple rounds, but had dropped out before a player covered the game-winning pattern. MegaMania did not comply with this requirement.

Due to these oversights, the Study fails to capture significant differences between MegaMania and the proposed rules. These differences would result in games compliant with the proposed rules performing significantly worse than MegaMania. It seems prudent, therefore, to view the percentage decrease in revenue per machine identified by the Study—57%—as a minimum. The actual percentage decrease will likely be much higher. Consequently, the NIGC should also consider the predictions derived from this estimate (lost gaming revenue, lost non-gaming revenue, lost tribal government revenue, and lost tribal member jobs) as minimums.

Oklahoma's Exclusion from Scenario 2

The Study errs in excluding tribes located in Oklahoma from Scenario 2, which it describes as the best estimate of aggregate gaming revenue losses. Study at 39. It excludes these tribes even though Oklahoma has the highest number of Class II games of any market, by far. According to the data used in the Study, Oklahoma Class II machines compose over 57% of the Class II machines currently in use. Tribes in Oklahoma are unlikely to suffer losses in gaming revenue, the Study says, because they have a "viable alternative" to Class II machines. It speculates that Oklahoma tribes will convert to Class III games and that such games will perform well enough to offset any costs incurred, thereby resulting in no decrease in overall gaming revenue.

This exclusion of Oklahoma is inappropriate and inaccurate. The NIGC data in the study fail to support the claim that tribes in Oklahoma have a viable alternative and will not experience a decrease in gaming revenue. As the Study notes, Class III machines in Oklahoma have yet to perform better than Class II games in Oklahoma. Study at 28-29. In fact, for much of the past year Class III machines have performed significantly worse than Class II games. Anecdotal evidence from the Tribes' casinos suggests that the two types of games have different customers. A distinct group of patrons in Oklahoma prefers Class II machines, and the Tribes' casinos cater to this group. Although several facilities nearby now offer Class III games, the Tribes' Class II games continue to draw many players who prefer the Class II style of play. The Study fails to account for this appetite for Class II games in Oklahoma. Nevertheless, the Tribes expect to incur significant costs and significant revenue losses as a result of the proposed rules eliminating its ability to serve these patrons.

Another unique aspect of the Oklahoma market is that tribes, such as the Cheyenne and Arapaho Tribes, often choose to operate small facilities which make tiny profits, simply to provide jobs to tribal members and other individuals in rural communities where jobs would otherwise be scarce. Adoption of the proposed rules may result in the Tribes closing their small Class II facilities with low profit margins, and other tribes in Oklahoma with small facilities may do the same. The Study supports this expectation. "[I]t is possible that marginally profitable gaming facilities (or gaming machines) may end up shutting down as a result of the proposed regulation changes." Study at 38. However, the Study does not quantify this negative economic impact and seems not to appreciate that such closures will occur in Oklahoma. Study at 28-29.

By excluding Oklahoma from Scenario 2, the Study implicitly assumes that job losses in Oklahoma tribal gaming facilities will be negligible. Yet the Study's methodology and the information presented in the Study supports a prediction that Oklahoma gaming facilities will reduce their workforces by at least 500 jobs. By taking the Study's predicted increase in revenue-sharing costs for Oklahoma as a loss in gaming revenue (between $49.6 and $74.5 million) and applying the Study's methodology for calculating lost tribal member jobs, one can demonstrate that Oklahoma should expect to lose between 596 and 895 gaming jobs as a result of the proposed rules. Between 149 and 224 of those jobs would be tribal member jobs. And the NIGC should recognize these numbers as minimums. The widespread anticipation of small rural facility closures makes it likely that even more gaming jobs will be lost in the State.

Each of these impacts will result in Oklahoma tribes losing gaming revenue, non-gaming revenue, tribal government revenue, and tribal member jobs. The NIGC should not accept Scenario 2 as an accurate estimate of the negative economic impact on tribes because the Scenario arbitrarily excludes the market which helped to create Class II electronic gaming—and which retains over 57% of the machines currently in play. It also excludes the specific predictable negative economic impacts identified above. Finally, the NIGC should note that by using the Study's methodology and the 2005 data available for Oklahoma, one can calculate Oklahoma tribes' expected lost gaming revenue. Such a calculation demonstrates that tribal gaming revenue in Oklahoma could decline by more than $720 million per year as a result of the proposed regulations.[1]

The Oklahoma Class II Market

The Class II industry largely owes its existence to Oklahoma's thirty-nine federally recognized Indian tribes. When large gaming manufacturers declined to enter the Oklahoma market, smaller innovative companies entered and developed Class II electronic games. Several of these companies established strong relationships with Oklahoma tribes. The tribes, in turn, defended the Class II games against repeated attacks from the NIGC and Department of Justice, and used the Class II games as leverage in compact negotiations with the State.

The Oklahoma compacting process demonstrated the importance that tribes in Oklahoma place on the right to choose to offer Class II games. The Cheyenne and Arapaho Tribes and others specifically negotiated for the ability to continue offering unlimited Class II games in their

[1] Based on the Study's calculated decrease in revenue of 57%, compliant Class II machines in Oklahoma would take in $52 per day (57% less than the $121 per day taken in by Class II machines in Oklahoma in 2005). With 28,601 class II machines in Oklahoma in 2005, the total decrease in gaming revenue would be $1,973,469 per day or $720,316,185 per year.

facilities. The Tribes consider revenue-sharing payments as a vital sovereignty issue, and they bargained for a unique compact arrangement that permits them to offer unlimited Class II gaming. As a result, the Oklahoma gaming compact enables tribal facilities to offer only Class II games (and thereby avoid revenue sharing), to have a mix of Class II and III machines, or to offer only Class III machines. The Cheyenne and Arapaho Tribes fought hard for this flexibility because they wanted to have the option to continue offering Class II gaming as it existed before the compact. Indeed, the Tribes view this option as a sovereign right to choose which games to offer in their facilities.

While the Study noted that switching from Class II games to the "viable alternative" of Class III machines in Oklahoma could stabilize tribal revenues, the NIGC should recognize that if this "viable alternative" becomes the only economically viable option for tribes in Oklahoma, their sovereign right to choose to offer Class II games will have been taken away. Tribes in Oklahoma may wish to offer Class II games for many reasons, and these reasons may not be quantifiable. Patrons may prefer the Class II games, the tribe may have a better relationship with Class II vendors, or the tribe may simply decide that it wants to offer Class II games regardless of their performance compared to Class III machines. That decision is for each tribe to make as a sovereign power. The Study fails to address the psychological impact to Oklahoma tribes caused by losing such a right to choose.

Essentially, the proposed rules would destroy the flexibility created by the unique arrangement that Oklahoma and the tribes established in the gaming compact. By asserting that the Oklahoma tribes will not lose anything by switching to Class III games, the Study makes a value judgment and identifies the Tribes' right to choose to offer Class II games as essentially worthless. The NIGC should hesitate before accepting such a paternalistic assertion.

Non-Quantifiable Negative Impacts

As the Study mentions, the proposed rules will likely cause several significant impacts which cannot be quantified. These impacts include: the decreased variety and quality of Class II machines; temporary and/or partial gaming facility closures; increased costs, such as capital costs, regulatory costs, training costs, revenue-sharing costs; and financing costs; decreased leverage in future compact negotiations/renegotiations; increased competition with charitable gaming facilities; and the restriction of new entry into the Class II machine market. Study at 13-17. Each of these impacts will impose costs on the Cheyenne and Arapaho Tribes. For instance, the proposed rules will certainly diminish the Tribes' relative bargaining position, resulting in a significant loss of leverage in renegotiating their gaming compact and a corresponding increase in revenue-sharing payments. The Study's author chose not to attempt to quantify these costs. Nonetheless, the costs are real and significant, and the NIGC should not accept the final results of the Study without recognizing that the true costs imposed on tribes by the proposed rules will be significantly greater than the figures explicitly stated in the Study.

Conclusion

For the foregoing reasons, the Gaming Commission urges the NIGC to view the Study's quantified economic impacts as minimums and to recognize the probability that the true negative economic consequences of the proposed rules will be significantly greater. The Study itself acknowledges that several negative economic impacts were not quantified, and states that "[e]stimated lost gaming revenue is likely to be conservative." Study at 41. Additionally, the NIGC should take into account, when deciding whether to adopt the proposed rules, the true costs to tribes—including the costs not quantified by the Study—as a result of the proposed rules.

Sincerely,

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By: ______________________
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